

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

CHARLES TYSON,	)	
	)	
Plaintiff,	)	
	)	
	)	CIV-11-617-M
v.	)	
	)	
DEBBIE MORTON, et al.,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION

On June 2, 2011, Plaintiff, a state prisoner appearing *pro se* and *in forma pauperis*, filed this civil rights action pursuant to 42 U.S.C. §1983. Plaintiff named as Defendants three state correctional officials, and he sought damages from Defendants in their individual capacities for alleged violations of his constitutional rights in connection with institutional disciplinary proceedings. Defendants have caused the filing of a Special Report consistent with Martinez v. Aaron, 570 F.2d 317 (10<sup>th</sup> Cir. 1978), completed by the Oklahoma Department of Corrections, and Defendants have moved for summary judgment with respect to Plaintiff's claims against them. (Docs. # 16, 17).

Before the undersigned is Plaintiff's Motion for Dismissal of his action. (Doc. # 20). Plaintiff has apparently reconsidered the legal merits of his action in light of the summary judgment motion filed by Defendants and the documentary evidence included in the Special

Report. A voluntary dismissal of the action without approval of the Court is unavailable to Plaintiff at this juncture of the litigation. See Fed. R. Civ. P. 41(a)(1)(voluntary dismissal of action by the plaintiff may be made without court order before the opposing party serves either an answer or a motion for summary judgment). However, an action may be dismissed by court order on appropriate terms. Fed. R. Civ. P. 41(a)(2). Plaintiff's Motion for Dismissal is therefore construed as a motion seeking dismissal of the action under Rule 41(a)(2).

In light of the circumstances, including the absence of any indication of prejudice to Defendants at this relatively early stage of the litigation, Plaintiff's Motion to Dismiss should be granted, and the action should be dismissed without prejudice.

#### RECOMMENDATION

Based on the foregoing findings, it is recommended that Plaintiff's Motion for Dismissal, construed as a motion seeking dismissal of the action pursuant to Fed. R. Civ. P. 41(a)(2), should be GRANTED and the cause of action should be dismissed without prejudice. The parties are advised of their respective right to file an objection to this Report and Recommendation with the Clerk of this Court by November 22<sup>nd</sup>, 2011, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The failure to timely object to this Report and Recommendation would waive appellate review of the recommended ruling. Moore v. United States, 950 F.2d 656 (10<sup>th</sup> Cir. 1991); cf. Marshall v. Chater, 75 F.3d 1421, 1426 (10<sup>th</sup> Cir. 1996)(“Issues raised for the first time in objections to the magistrate judge's

recommendation are deemed waived.”).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter, and any pending motion not specifically addressed herein is denied.

ENTERED this 2<sup>nd</sup> day of November, 2011.

  
GARY M. PURCELL  
UNITED STATES MAGISTRATE JUDGE